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ABSTRACT

In California, the desire to do something about child abuse, fanned by repeated and often sensational media coverage, has led to an understandable but counterproductive overreaction on the part of professionals and citizens reporting suspected child abuse. Child protective agencies receive an average of one report a minute. There are over 300,000 reports a year. Since 1965, Section 11110 of California's Penal Code has mandated that the State Bureau of Identification maintain records of all reports of suspected child abuse. The collected reports are called the Child Abuse Index (or Registry). Over time, data from the Registry and access to it have increased. But alleged offenders are denied notice of whether they are in the registry and on what grounds. Concern about such records arises because the system now serves a second, not originally intended, purpose: the Index is used for screening the name of every applicant for licensure or employment in a California child day-care facility. Because the Department of Social Services can use the system to deny licensure, serious due process questions are raised. Nine recommendations for removing negative consequences of the system and enabling it to adequately meet its purpose are proposed. A description of the Children's Roundtable Project of the California Children's Council and a list of roundtable participants are included. (RH)

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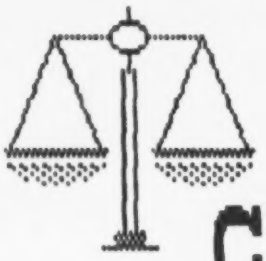

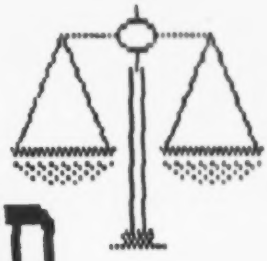

CHILD CARE AND THE CHILD ABUSE INDEX

A REPORT FROM THE CALIFORNIA CHILDREN'S COUNCIL

1988

PS CHILD CARE

CHILD CARE & THE CHILD ABUSE INDEX

Over the past few years, child care and child abuse have been linked together in a distorted framework which portrays child care as fertile territory in which child abusers can wreak havoc. This perception has resulted in dire consequences to providers, parents, children and the child care delivery system; the very people the law was designed to protect. Those consequences have included: encouraging an atmosphere of distrust between parents and providers and among child care staff members; clogging the child abuse reporting system with false reports, which divert enforcement resources; creating a chilling effect on new licensees who are now reluctant to enter the field of child care; and putting increased strain on the economic costs of child care especially through insurance premiums, cost of care and personnel turnover. In addition, the costs associated with administering the child abuse reporting program have increased dramatically.

HISTORICAL OVERVIEW

Historically child care has been and continues to be a deterrent to child abuse within the family, where 98% of all child abuse occurs. The sources of the myth that child care and child abuse are linked are easily identified. Primarily, the media has given sensational attention to a

few infamous cases of child abuse in child care settings, some of which were totally unfounded, some of which remain unresolved today, and only some of which resulted in successful prosecutions. In the wake of the media attention, lawmakers, too, gave credence to the myth and passed or proposed a record number of bills to end child abuse by imposing new requirements on child care programs and granting new powers to government regulators. Some members of the mental health profession also jumped on the bandwagon intimating that child care workers were prime suspects of committing child abuse, particularly sexual abuse.

The McMartin case hit the front pages in 1984 and sent shockwaves throughout the country. The allegations were terrifying. Many parents who were using or seeking child care became hysterical. The normal guilt involved in leaving a young child in someone else's care became a paralyzing fear of making a wrong choice. Parents suspected abuse in the normal activities of nurturing -- hugging, holding, diapering, napping, etc. The response reflected America's ambivalence about out of home child care and the growing numbers of working mothers. The implicit message was that if these children had been cared for at home, these frightening allegations could never have occurred. The media attention sensationalized child abuse in a tiny segment of society, while ignoring the massive problem of the mistreatment of children within their own families.

Many bills were introduced which would "fix" child care so that another "McMartin" could never happen. After all, it was easier and less expensive to make changes in a State-regulated institution than to give support to families. Legislation mandated additional initial screening of child care workers against the child abuse registry, enhanced the enforcement powers of licensing authorities, and increased parent obligations and rights in child care settings. Parents were required to sign a pamphlet describing the indicators of sexual abuse upon enrolling a child in a licensed facility. Child care workers were informed of their responsibilities as mandated child abuse reporters. At the Federal level, training funds were tied to States' instituting criminal record screening for child care workers. In order to receive federal training money, states were required to institute criminal records screening mechanisms.

New mandates were passed and old laws were "strengthened". As a result of this rush to legislate, there has been little time for reflection or assessment of the results of those changes. In particular, not much attention has been focused on the use or misuse of the screening and recordkeeping processes: the child abuse registry.

The language of Penal Code Section 11170 regarding indexed reports of child abuse,[1] first enacted in 1980, is straight forward enough at first blush. The legislative findings identify the underlying basis of these provisions. Those findings include: "One of the major problems in treating and preventing child abuse is the need to quickly and accurately identify cases, which frequently involve family members or other individuals in close relationship to the victim". As the Legislature indicated, the laudable intent of these provisions is to provide "an important source of information assisting local law enforcement officials and child protective agencies in identifying, apprehending, and prosecuting child abusers". (Section 5 of Stats. 1984 c.1613). This language raises an expectation that the system will be designed and maintained to meet that intent. Therefore, it should contain well-defined criteria for including or excluding information, a mechanism for cataloging and evaluating new data, and a system that is responsive to that new data. In other words, if a new child abuse report information came in which reinforced previous information it would be used to intensify an investigation. Conversely, if information came in which exonerated an individual that name would be purged from the registry.

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1 For text of Code section, see Appendix A.

Appendix A was not included with the copy received by ERIC.

However, actual implementation of this approach has been weak primarily because the Department of Justice (DOJ) must rely on reports from local law enforcement agencies whose standards and procedures vary from jurisdiction to jurisdiction. Moreover, the current system contains no Procedural safeguards to ensure that only accurate information is being maintained and utilized. Therefore, the actual implementation of these provisions has had some far reaching, unforeseen and very negative consequences for child care.

ANALYSIS OF EXISTING SYSTEM

As noted above, the purpose of the index, as originally envisioned, was to protect children. It would establish a mechanism to track instances of abuse, the suspected abusers and the alleged victims. Arguably, the existing system could meet that purpose, but only at an extraordinary cost. It is our goal to examine that system and to recommend changes, where needed, which would in fact meet that intent but without the deleterious effects of the present system.

First, we must question whether or not the existence of a registry is necessary, useful or beneficial in protecting child abuse victims or potential victims. Originally, the

Statute governing records maintained by the Department of Justice with regard to child abuse was found in Section 11110 of the Penal Code:

> The State Bureau of Identification shall maintain records of all reports of suspected infliction of physical injury upon a minor by other than accidental means and reports of arrests for, and convictions of, violation of Section 273a.
>
> On receipt from a city police department, sheriff or district attorney of a copy of a report of suspected infliction of physical injury upon a minor by other than accidental means received from a physician and surgeon, dentist, resident, intern, chiropractor or religious practitioner, the bureau shall transmit to the city police department, sheriff or district attorney, information detailing all previous reports of suspected infliction of physical injury upon the same minor or another minor in the same family by other than accidental means and reports of arrests for, and convictions of violation of Section 273a, concerning the same minor or another minor in the same family.
>
> The bureau may adopt rules governing recordkeeping and reporting under Section 11161.5. (Stats 1965 c.1171 Sec.1)[2]

In 1980, the data available from the registry was expanded in content to include information relevant to the instance reported. Access to that information was expanded to: child protective agencies reporting the incident, the reporting medical practitioner, child custodian, or guardian ad litem if he or she is treating or investigating a case of

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[2] In 1972 the Department of Justice was substituted for the Bureau (Stats 1972 c.1377 Sec.83)

suspected child abuse. (Chapter 1071, Statutes 1980, Section 4). Subsequently, the provisions were amended in 1981 and 1982 to provide access to a district attorney requesting information and to include " all preliminary reports of child abuse" submitted pursuant to Section 11169 of the Penal Code. (Statutes 1981 c.435 and Statutes 1982 c.162). The Attorney General's Commission on the Enforcement of Child Abuse Laws recommended that legislation be introduced to allow the Department of Social Services access to the Department of Justice Registry (Commission on the Enforcement of Child Abuse Laws Final Report, 1985 p.1-14). This change was codified in 1985. Thus, those with access to the information has steadily increased beyond the original law enforcement agencies found in the 1965 Statute. Yet, the alleged offender has never had, and continues to be denied, any notice of whether or not they are in the registry and on what grounds.

The best measure of the utility and/or success of maintaining a registry at all is how many cases of suspected child abuse were successfully resolved as a result of information contained in the registry. Currently, no comprehensive study has been done to produce that data. Thus any conclusions we would draw would be speculative at best. What data does exist suggests that the utility of the registry with regard to screening child care providers certainly must be questioned. The information is in the registry on the basis of a child abuse report and is never

tested through any legal process. Once a name is entered, it is retained on the basis of the information provided by the reporter and any investigation conducted following that report. Thus, an accused person has not been afforded an opportunity to be heard and in virtually all cases has not even received notice that they are in the registry.

As noted above, the legislation creating the registry raised an implication that there would be an effective action taken in order to address its purpose. The current system is set into motion when a complaint of child abuse is made to one of several agencies. These agencies each must send a report to the Department of Justice in writing of every case it investigates which it determines is not "unfounded". "Unfounded" is defined as "false, inherently improbable, to involve accidental injury or not to constitute child abuse as defined in Section 11165 [of the Penal Code]": Virtually every report is investigated, and indeed several Penal Code provisions require an investigation, (see ex. 11166, 11166.1). In addition, there are local protocols established between law enforcement, DSS, probation and the District Attorney which also reiterate that investigations are required. For example, in Santa Clara County, the protocol requires that all cases reported must be investigated by the police and even the preliminary investigation must be coordinated with the licensing evaluator. Thus, all cases except those which are unfounded will be filed with the registry. The narrow

definition of "unfounded" coupled with the absence of any hearing process must result in virtually all reports being filed and retained in the registry.

Concern about such extensive records arises because the system now serves a second purpose -- one that was not originally intended. The name of every applicant for licensure or employment in a child day care facility is screened through the Child Abuse Index. (The terms "index" and "registry" are used interchangeably throughout this paper. Both refer to the system maintained by the Department of Justice as a permanent record of child abuse reports). If there is a match, DSS conducts an investigation to determine whether the applicant or employee should be barred from caring for children on the basis of the incident reported to the registry. The inexactness of the information contained in the child abuse registry -- reports are classified only as substantiated or unsubstantiated (terms which are not defined in the Child Abuse Reporting Law) -- requires an additional investigation to be conducted to determine both the details and the veracity of the registry information. On the basis of this investigation, DSS determines whether there is enough information that the applicant has mistreated children to form the basis of an administrative action to deny the license or, in the case of an employee, to bar that person from employment in the child care facility. Such investigations require a tremendous amount of resources,

since the reported incident could have occurred in any jurisdiction in the state, and at any time. In addition, the Department has a limited number of trained investigators who must either conduct an entirely new investigation or second guess the prior investigator's findings. In fact, DSS personnel have informally indicated both their discomfort and inadequate skills in conducting such inquiries. Such discomfort is understandable, especially if decisions must be made based on old records or on inferences or impressions of prior investigators. Many DSS investigators simply lack the experience to make such judgments without law enforcement guidance. If the prior investigation, conducted by trained professionals, did not result in criminal or administrative action, it is difficult to justify a second investigation of stale facts by more inexperienced personnel.

At first blush, the Penal Code seems to provide for an effective index system. The Code contains instructions that the Department of Justice shall continually update the index, that child protective agencies shall notify the Department if a case subsequently becomes unfounded and shall not retain such reports, and permits the Department to adopt rules governing recordkeeping and reporting. The actual implementation of the index has not followed this framework even to the extent of adopting rules governing its use.

Furthermore, the definition of "unfounded" removes only a very few incidents from the registry. Complicating matters even more are the "unsubstantiated" cases which are maintained in the registry. The DOJ retains reports that they characterize as "unsubstantiated". Although the term is not defined in the Code, these are instances in which there is inadequate, unusable or incompetent[3] evidence to substantiate the report so that the investigation stops and no action is taken either by child welfare or law enforcement officials. Without a clear definition, there is no guidance about the relevance of such a report, except to know that there is more evidence than if it were unfounded and less than if it were substantiated. Because DSS can now use the system to deny licensure to child care applicants, serious due process questions are raised if a licensing action is based on those reports which do not rise to a level requiring arrest, let alone a trial and conviction. In a hypothetical scenario, an individual applicant for licensure would have her first opportunity to be heard at an

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3 Incompetent evidence sometimes arises when a child is too young or unable to testify in court and there are no other witnesses to the events.

administrative hearing after her license was denied. Even more troubling is the case of an employee in a child care facility, who should be able to assert constitutional rights to a hearing should employment be barred by the state, but who has no statutory due process guarantees. Such a person would be able to defend her right to employment only by enlisting the aid of an attorney and going into court.

In several other states, the requirement for such due process is either included in statutory provisions or has been imposed by the courts.

Furthermore, although there are plans to computerize the registry to improve its efficiency, this process has yet to be completed.

CONCLUSION

Threats and fears of being wrongfully reported for child abuse plague child care providers today. Such fears are exacerbated by the use of the registry which gives any child abuse report an official and long term impact. An isolated incident, however "unsubstantiated", now follows a child care provider for the rest of his or her professional life. One sad legacy of the McMartin case is that the potential of a child abuse allegation hangs over all providers of out of home care for children.

The emotionally charged desire to "do something" about child abuse, fanned by repeated and often sensational media coverage, has led to an understandable but counter-productive overreaction on the part of the professionals and citizens who report suspected child abuse. The nation's child protective agencies are being inundated by reports. One commentator estimates as many as 65% of all reports must be dismissed after an investigation for a variety of reasons. At one extreme, child care providers talk of reporting every little injury they detect in a child as a defensive measure -- so the parent won't be able to say it happened at child care and report them. At the other extreme, parents threaten to and actually make reports when they have financial or child rearing disagreements with the child care provider.

This flood of reports is overwhelming the limited resources of child protective agencies, so that they are increasingly unable to protect children in real danger. In California, according to an article in the Sacramento Bee, "Every two minutes of every day, on the average, the system receives a report...more than 300,000 times a year. The enormous workloads are overwhelming the apparatus."

False reporting has overwhelmed the registry which now contains so much data that screening through it in an expedient and accurate fashion seems incomprehensible. With so many reports, the chance for error in reviewing data is enhanced.

Does the child abuse registry serve a legitimate and useful purpose? If restricted to its original purposes -- a tool to aid in detecting patterns of mistreatment of victims too young to protect themselves -- the answer is probably yes. The yes is qualified because without built in protections of due process and privacy, then the registry remains a powerful and unbridled tool of the state with the potential to do great harm to individual citizens.

Recommendations

In an effort to remove many of the negative consequences of the system and to enable it to more adequately meet its intended purpose, we propose nine recommendations.

1. That the registry should not be used to screen licensing applicants or child care employees, and that DOJ must develop regulations regarding the appropriate use of the registry information.
2. In order to avoid a challenge on Constitutional grounds, every individual whose name is retained in a registry report must be notified that they are in the registry; and
3. An appeal process must be provided before an administrative law judge to determine if a claim should be retained.

4. The system must be purged of all "unfounded" complaints in a consistent and timely manner, and an accurate registry must be maintained on an ongoing basis.
5. Bifurcate the registry to include information on victim and suspect.
6. Adopt the following registry retention classifications and definitions of those classifications for each registry victim and suspect:
    - o Unfounded for victim - When the investigation indicates the act complained of is false, inherently improbable, involved accidental injury or does not constitute child abuse.
    - o Unfounded for suspect - When the investigation indicates that it is false or inherently improbable that the individual committed the act or the act didn't occur, was an accident or was not child abuse;
    - o Unsubstantiated for victim - When the investigation discloses insufficient evidence to clearly prove or disprove the allegations made;
    - o Unsubstantiated for suspect - When the investigation discloses insufficient evidence to clearly prove or disprove the allegations made against the suspect;

- o Substantiated for victim - When the investigation discloses that the act complained of did occur and constitutes child abuse;
- o Substantiated for suspect - When the investigation discloses that the act complained of did occur and constitutes child abuse;[4]

7. DSS licensing evaluators must be trained to investigate child abuse reports and mandated to conduct their investigations in conjunction with law enforcement.
8. DSS must review and improve the criteria for investigations of alleged child abuse. These criteria should include: whether DSS investigators can interview children and under what circumstances, interagency coordination and statewide standardized investigation procedures.
9. The Legislature should establish an oversight committee to study, evaluate and monitor the use of the child abuse registry, and the use of the information it contains.

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[4] These definitions are modeled on those found in the Los Angeles Police Department Manual for disciplinary procedures.

The California Children's Council
Children's Roundtable Project

The California Children's Council is a non-profit corporation dedicated to the public benefit in the arena of children's services. It incorporated in 1983, with the core of its original board of directors coming from the membership and staff of the State of California's Governor's Advisory Committee on Child Development during the years 1977 to 1985.

The Council is organized to serve the children and families of California by promoting appropriate research, consultation, and public education which recognize and build upon the competence of parents. The Council works to achieve this goal by:

- Instructing and training individuals to improve their abilities and to develop their capabilities to work with young children and their families.
- Instructing the public about early childhood development and thereby benefiting the community through increased understanding of the needs of young children.
- Publishing educational materials in the public interest.
- Conducting public discussion groups, panels, workshops and conferences on topics within the field of early childhood development.
- Providing management consultation and other technical assistance to human service organization.
- Promoting and conducting research and public education in child development, child care, and special education.

Recently, two of the Council's principal activities have been annual "Care for the Children" activities and a special project called the California Children's Roundtable. The "Care for the Children" events have included family picnics, marches, and press conferences, all organized as public education activities in the realms of family life and child care needs. The Children's Roundtable is a policy seminar conducted with resources provided by the James Irvine Foundation. Through the Roundtable, the Council was able to complete a set of issue papers on topics important to child care and public policy; a photo essay on poverty, work, and family life; and the design for a study of parental attitudes toward school readiness and the "hurried child."

Additional information on the Roundtable projects can be obtained by writing to the Council, 17516 Labrador St., Northridge, CA 91325.

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